

March 1943

Discussion of Recent Decisions

Chicago-Kent Law Review

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Recommended Citation

Chicago-Kent Law Review, *Discussion of Recent Decisions*, 21 Chi.-Kent L. Rev. 188 (1943).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol21/iss2/5>

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CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF
CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS
Subscription price \$2.00 per year Single copies, 75c Foreign subscription, \$2.50

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VOLUME 21

MARCH, 1943

NUMBER 2

DISCUSSION OF RECENT DECISIONS

CONTRACTS—REQUISITES AND VALIDITY—CONSIDERATION NECESSARY FOR AN HEIR'S PROMISE TO PAY ANCESTOR'S DEBT SO AS TO TOLL THE STATUTE OF LIMITATIONS AND BIND THE ESTATE—The well-established currents of authority concerning moral consideration are difficult to reconcile with the recent decision in the case of *Glenn v. McDavid*,¹ in which it was held that an administrator was liable, as such, for the lapsed debt of the decedent because of a written promise to pay the same made by the sole heir after the period of limitation had run. The discussion of the point is unfortunately too brief in the opinion, which cites no authority, and seems merely to hold that, because an heir has such an interest in the estate as will permit him to contest the allowance of a claim and to plead the Statute of Limitations as a defence, he should also be able to remove the statutory bar as to his interest in the estate.

It is a fundamental principle of the common law that a contract should be supported by a consideration. A consideration is usually found in a benefit to the promisor or a detriment to the promisee. A benefit to a third person is considered as a valid consideration for a promise only if such benefit is conferred after the promise was made and in reliance thereon. A past consideration would support a subsequent prom-

¹ 316 Ill. App. 130, 44 N. E. (2d) 84 (1942).

ise only if it resulted in some actual benefit to the promisor measurable in money. There is, however, an extension of these general rules in cases where there first existed an enforceable and binding contract, which had become unenforceable by reason of a rule of law such as the Statute of Limitations² or a discharge in bankruptcy,³ in which situations the unsupported subsequent promise serves to revive the obligation. Such a result may be explained either as a revival of the enforceability of the legal remedy upon the subsisting original promise, or as a new contract based only upon a moral obligation to perform the original promise, although the original contract has entirely ceased to exist. The basis for the promise is then said to be a moral obligation. In cases of the latter type, the consideration is found in the actual consideration originally received by the promisor, provided that at the time of the promise there is an actual intent to enter into a contract.

In some jurisdictions it has also been held that a benefit previously conferred or a detriment suffered may become the basis for a subsequent enforceable contract if a promise be later made. Such is the case, naturally enough, where a debt of the promisor has been paid for him,⁴ where improvements have been made upon the promisor's property,⁵ or where past services have been rendered.⁶ The courts often base their decisions, in cases of this type, upon the existence of the ethical duty, originally unenforceable at law but sufficient as a "moral obligation," to produce a ripening into a contract when a subsequent promise is made.

Thus there are authorities holding that a moral obligation will support a promise to pay for past as well as future support of an illegitimate child.⁷ But in most cases, the weight of authority is against the enforceability of the promise based purely on a moral consideration. A son's promise to pay for necessities furnished to his father, therefore, will not be enforceable.⁸ Likewise, it has been held that a wife's verbal prom-

² *Hulse v. Hulse*, 155 Ill. App. 343 (1910); *Chabot v. Tucker*, 39 Cal. 434 (1870); *Hoover v. Wasson*, 11 Cal. App. 589, 105 P. 945 (1909).

³ *Mutual Reserve Fund Life Ass'n v. Beatty*, 93 F. 747 (1899); *Murphy v. Crawford*, 114 Pa. 496, 7 A. 142 (1886).

⁴ *Bevan v. Tomlinson*, 25 Ind. 253 (1865); *McGuire v. Lawton*, 9 Pa. Dist. & Co. 730 (1926); *Park Falls State Bank v. Fordyce*, 206 Wis. 628, 238 N. W. 516 (1931).

⁵ *Morse v. Crate*, 43 Ill. App. 513 (1892); *Hayward Lumber & Invest. Co. v. Lyders*, 139 Cal. App. 517, 34 P. (2d) 805 (1934); *In re Pohl's Estate*, 136 Pa. Super. 91, 7 A. (2d) 14 (1939); *Drake v. Bell*, 55 N. Y. S. 945 (1899); *Pittsburgh Vitrified Paving & Bldg. Brick Co. v. Cerebus Oil Co.*, 79 Kan. 603, 100 P. 631 (1909); *Ferguson v. Harris*, 39 S. C. 323, 17 S. E. 782 (1893).

⁶ *State ex rel. Morgan v. Rusk*, 37 Ohio App. 109, 174 N. E. 142 (1930); *Holland v. Martinson*, 119 Kan. 43, 237 P. 902 (1925); *Viley v. Pettit*, 96 Ky. 576, 29 S. W. 438 (1895); *Root v. Strang*, 28 N. Y. S. 273 (1894); *In re Simmons' Estate*, 96 N. Y. S. 1103 (1905); *In re Sutch's Estate*, 201 Pa. 305, 50 A. 943 (1902); *Boothe v. Fitzpatrick*, 36 Vt. 681 (1864); *Spencer v. Potter's Estate*, 85 Vt. 1, 80 A. 821 (1911); *Olsen v. Hagan*, 102 Wash. 321, 172 P. 1173 (1918); *Silverthorn v. Wylie*, 96 Wis. 69, 71 N. W. 107 (1897); *In re Hatten's Estate*, 233 Wis. 199, 288 N. W. 278 (1940).

⁷ *Hook v. Pratt*, 78 N. Y. 371 (1879).

⁸ *Cook v. Bradley*, 7 Conn. 57 (1828); *Schwerdt v. Schwerdt*, 141 Ill. App. 386, affirmed in 235 Ill. 386, 85 N. E. 613 (1908).

ise to her dying husband to pay his note will not be enforced.⁹ An heir's promise to pay a legacy which had failed because of an improper execution of the will is also regarded as being without consideration.¹⁰ In the case of a widow's note given in payment of her deceased husband's debt, there is no consideration if the estate proves to be without assets.¹¹ A doubtful Pennsylvania case, however, contains language to the effect that an executor, who has assets in his hands, is under an obligation to pay a legacy and, therefore, his promise will be enforceable against him, though it was also said that the defendant could have been held liable in a more roundabout way.¹²

Illinois is in line with the majority rule that "the only moral obligation which affords consideration for a promise is one which has at some time been a legal duty,"¹³ and that "a moral obligation does not suffice for a consideration unless the moral obligation was once a legal one."¹⁴ It has also been said that "to bind a party to a new promise there must exist the elements essential to a new contract, express or implied."¹⁵

It is true that, in the case of a mortgage, the grantee may toll the Statute of Limitations by making payments of interest, since this may be held to be an admission of an existing liability.¹⁶ It has even been held by the Illinois Supreme Court that payment of interest by a grantee will toll the statute both as to the grantee's own life estate and as to the reversion.¹⁷ This is not a revival of Lord Mansfield's holding in *Whitcomb v. Whiting*¹⁸ to the effect that payment by one joint promisor is binding on all joint promisors because the payor may act as agent for the others. That case was expressly repudiated in the United States by Justice Story in the case of *Bell v. Morrison*.¹⁹ It was likewise repudiated in Illinois, where it was expressly said that "*Whitcomb v. Whiting* has been repudiated by the decisions of this court,"²⁰ and, in another case, that "a just reaction has taken place against the rulings of Lord Mansfield, which went so far to neutralize the beneficial purposes of the law."²¹ But since a grantee may revive the mortgage debt and lien

⁹ *Fidelity & Casualty Co. v. Thompson*, 128 Cal. 506, 61 P. 94 (1900).

¹⁰ *Morris v. Abney*, 135 La. 302, 65 So. 315 (1914).

¹¹ *Bank of Commerce v. McCarty*, 119 Neb. 795, 231 N. W. 34 (1930); *Williams v. Nichols*, 10 Gray (Mass.) 83 (1857); *Sykes v. Moore*, 115 Miss. 508, 76 So. 538 (1917); *Kircher v. Sprenger*, 4 Pa. Dist. 144 (1895).

¹² *Clark v. Herring*, 5 Binn. (Pa.) 33 (1812).

¹³ *Schwerdt v. Schwerdt*, 235 Ill. 386 at 390, 85 N. E. 613 at 614. See also on this point, *Hart v. Strong*, 183 Ill. 349, 55 N. E. 629 (1899), and *Strayer v. Dickerson*, 205 Ill. 257, 68 N. E. 767 (1903).

¹⁴ *People v. Porter*, 287 Ill. 401 at 406, 123 N. E. 59 at 61 (1919), citing *Finch v. Green*, 225 Ill. 304, 80 N. E. 318 (1907). See also *Hobbs v. Greifenhagen*, 91 Ill. App. 400 (1899).

¹⁵ *Kallenbach v. Dickinson*, 100 Ill. 427 at 435 (1881).

¹⁶ *Macfarland v. Utz*, 175 Ill. App. 525 (1912).

¹⁷ *Pinkney v. Weaver*, 216 Ill. 185, 74 N. E. 714 (1905).

¹⁸ 2 Douglas 652, 99 Eng. Rep. 413 (1781).

¹⁹ 1 Peters 351, 7 L. Ed. 174 (1828).

²⁰ *Kallenbach v. Dickinson*, 100 Ill. 427 at 435 (1881).

²¹ *Norton v. Colby*, 52 Ill. 198 at 202 (1869).

in spite of the Statute of Limitations, it has also been held that all the heirs together may likewise toll the statute because they have an interest in the property and so they are not volunteers.²² Such a promise, however, would bind the property itself and not the personal estates of any but the actual promisors.

At first glance, the holding of the Illinois Appellate Court in the instant case does not seem to proclaim a return to Lord Mansfield's decision since here the liability resulting from the promise applies only to the heir's interest in the estate; it was, indeed, agreed in the instant case that all the assets of the estate accrued to the promisor, so there was no question of agency discussed. However, it should be noted that the litigation was about a claim made against the estate, and it seems logically impossible not to conclude that the estate of the original promisor, now deceased, is being held liable simply because of the personal promise of the heir and devisee to pay.

We must admit at the outset that such a promise is valid and binding as against the new promisor. This we can do only on the basis of a moral consideration, which can only be found in the purely moral and legally unenforceable duty to pay an ancestor's debt, a duty which is even more unenforceable in this case because the Statute of Limitations had run in favor of the ancestor herself. Should the instant case simply hold that such a peculiar consideration is sufficient to raise an enforceable subsequent promise, it should deserve notice as being, to say the least, unusual, and as enlarging the scope of the moral consideration concept.

Having, nevertheless, first admitted the validity of such a promise, we have no hint from the court explaining by what process such a promise can bind the original promisor's assets in the hands of her personal representatives so as to justify allowance of the claim as against such personal representatives rather than against the new promisor. We should not lightly infer that the court intended to revert to any doctrine of obligation by implied agency as in Lord Mansfield's holding. Indeed, even such an inference would not suffice here to explain the result reached, since the English case went only so far as to allow agency by a joint debtor to bind another joint debtor, and the relation of joint debtors can surely not be implied in the present case merely from the existence of a family relationship.

True enough, in a very recent Illinois decision,²³ the executor was allowed to charge against a legatee a debt due from the legatee to the deceased, although barred by the statute, but that decision was not noticed in the instant case, nor could it possibly be applicable unless we further assume that a creditor of the heir or legatee may hold the estate liable on the legatee's promise, a result which seems hardly justifiable.²⁴

²² *Lyman v. Zearing*, 187 Ill. App. 361 (1914).

²³ *Fleming v. Yeazel*, 379 Ill. 343, 40 N. E. (2d) 507 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 277.

²⁴ See also *Vater v. Vater's Adm'rs*, 278 Ky. 440, 128 S. W. (2d) 951 (1939). There is, in fact, conflict of authority as to whether a judgment creditor of an heir may

Indeed, the present decision amounts to holding the ancestor's estate liable on the promise of the heir and legatee, which is quite a departure from the standard methods of collecting debts. The claimant might conceivably have obtained a judgment against the new promisor and then equitably enforced such a judgment against the share of the new promisor in the ancestor's estate. The method permitted by the decision in the instant case appears, indeed, to be a most effective way to avoid a multiplicity of suits, since it allows the creditor to reach assets without having to litigate or even to allege directly the liability of the real debtor, to-wit: the heir. It fails, however, to explain the reason why the creditor should be allowed to begin his collection procedure against the heir by simply filing a claim against the estate in which the heir is interested. The desirability of such procedure is questionable. G. MASCHINOT

CORPORATIONS — CORPORATE PROPERTY, FUNDS, AND SECURITIES — WHETHER TRANSFEROR OR TRANSFEREE OF SHARES HELD BY SHAREHOLDER WHO DISSENTED FROM SALE OF SUBSTANTIALLY ALL OF CORPORATION'S ASSETS HAS RIGHT TO RECOVER AWARD BY APPRAISERS FIXING VALUE OF STOCK — The Court of Appeals of Ohio decided the two cases of *Bishop & Babcock Company v. Fuller* and *Bishop & Babcock Company v. Kehr*,¹ simultaneously, in an opinion dealing with a novel problem in the field of private corporations. The first of these cases dealt with the right of the purchaser of shares, from one who had dissented from a sale of substantially all of the corporate assets, to recover the value of the shares. The second case involved the right of the dissenting shareholder, who had disposed of a number of the shares which he owned at the time that he voiced his dissent, to recover the value of a like number of shares which he had purchased subsequently. The court appears to be correct in its statement that there are no adjudicated cases upon the propositions directly presented in these two cases. As a consequence of this lack of authority the court limited its conclusions to an interpretation of the statutes² which control the rights of the parties. The pertinent portions of these statutes must, therefore, be considered. A stockholder who is dissatisfied with the sale of substantially all the assets of a corporation may, within thirty days of the adoption of the agreement to sell, state his objections thereto in writing, file them with the corporation, and, in writing, demand payment for his stock. Upon disagreement as to the value of the stock, a provision is made for arbitration.³ Failure to pay the award makes the amount thereof collectible as other debts against the corporation. On receiving payment of the award, the stockholder is required to surrender his stock

do so much as to contest the will, on which point see 19 CHICAGO-KENT LAW REVIEW 227.

¹ — Ohio App. —, 43 N. E. (2d) 638 (1931). For some unexplained reason, the decision was not published until 1942 in the *Northeastern Reporter*, Second Series. It does not appear ever to have been published in the Ohio App. Reports.

² Ohio Gen. Code, §§ 8713-7; Page's Ohio Gen. Code Anno. §§ 8623-72.

³ *Ibid.*, § 8713.

to the corporation.⁴ The Ohio statute permits the corporation to discharge its debt by depositing the amount of the award with the clerk of the common pleas court of the county in which the arbitration was held, such deposit operating as a cancellation of the stock upon the books of the company.⁵ The corresponding provision of the Illinois Business Corporation Act⁶ is of similar import. On the basis of these provisions, the Ohio court held that the assignee of the shares which were the basis of dissent could recover the amount of the award, but that the shareholder who, after having dissented, sold some of his shares and subsequently purchased the same number in order to make up his complete block could not recover the value of the repurchased shares.

Similar statutes exist in other states. There are variations of the Ohio and Illinois statutes but they are generally⁷ considered to serve a dual purpose. They enable the majority to carry out the policies which seem to them best, while permitting the minority to avoid bearing the consequences of the majority's adoption of these rather extraordinary and unexpected measures. If this be the intent of the several legislatures, and if the surrender of the shares be required as concurrent to the receipt of payment of the award, there can be no doubt of the wisdom of the Ohio decision. It certainly appears that the owner of the shares at the time of the adoption of the agreement to sell has a valuable right to enforce arbitration and award, which right may be the subject of an assignment. It further appears that the corporation has a right to the surrender of those shares, which were the basis of the dissent, at the time of the payment of the award. Conversely, the dissenting shareholder should not be permitted to recover upon shares which he had later purchased which were not the basis of his, nor any other person's, dissent. In this way the rights of the corporation, of the majority, and of the minority are all protected and the statutes accomplish their main purpose.

It may be of some value to consider here the more important statutes of other states. The Massachusetts provision⁸ applies only to the rights of minority shareholders upon the sale, lease, or exchange of corporate assets. The New York sections⁹ apply not only to that situation but also to amendments changing the rights or preferences of shareholders. Louisiana,¹⁰ among other variations, authorizes action by the dissenting shareholder only if less than eighty per cent. approved the corporate action and provides for determination of the value of the

⁴ *Ibid.*, § 8714.

⁵ *Ibid.*, § 8717.

⁶ Ill. Rev. Stat. 1941, Ch. 32, § 157.73.

⁷ See Fletcher, *Cyclopedia of the Law of Private Corporations*, Perm. Ed., § 5891; 18 C. J. S., *Corporations*, § 515, p. 1194; 13 Am. Jur., *Corporations*, § 1216, p. 1113; also annotation in 79 A. L. R. 624.

⁸ Mass. Gen. Laws, Ch. 156, § 46.

⁹ N. Y. Stock Corp. Law, §§ 21 and 38, subd. 9; Cahill's Consol. Laws, Ch. 60, §§ 21 and 38, subd. 9.

¹⁰ Dart Gen. Stat., § 1132.

stock by the court. It will be seen that these changes do not impair the general intent embodied in the Ohio and Illinois statutes.

The hardship upon minority shareholders in the absence of such a provision is illustrated by the case of *General Investment Company v. American Hide & Leather Company*.¹¹ The plaintiff there was a holder of preferred shares. The majority, in order to secure the investment of new capital, found it expedient to authorize a new type of shares with a priority of preferences, both as to principal and dividends, over the existing preferred shares. The minority shareholder was not able to enjoin this subordination of his rights as a shareholder and had to continue as a shareholder. It has been said¹² that these statutes were designed to meet the evils created by the stalemate existing in their absence by enabling a majority or some percentage greater than a majority¹³ to sell if they deemed it the best policy, and at the same time protecting the minority if they regarded the sale as opposed to their interests. The decision of the Ohio court seems to be a definite step toward the elimination of the evils which still may exist.

M. L. GOODMAN

EXECUTORS AND ADMINISTRATORS — APPOINTMENT, QUALIFICATION AND TENURE — WHETHER PERSON NOMINATED BY ONE MEMBER OF CLASS TAKES PRECEDENCE OVER OTHERS IN SAME CLASS AS TO RIGHT TO ADMINISTER ESTATE—In the case of *In re Marco's Estate*¹ the court for the first time had occasion to pass upon the preference sections of the 1939 Probate Act² dealing with the right to nominate an administrator. In that case one Frank Marco died intestate leaving as his heirs-at-law a resident brother and a resident sister.³ The resident brother relinquished his right to administer and nominated one Rose M. Kelly to administer in his stead. She filed her petition for letters of administration and a date for hearing was set. Notice was given, as required by the Act,⁴ to the resident sister who thereupon filed her petition requesting that letters of administration be issued to herself. At the hearing on both petitions, that of the brother's nominee was denied and letters of administration were granted to the resident sister. An appeal to the circuit court terminated in the same result. On appeal by the nominee, the appellate court affirmed the ruling, holding that the resident brother had no preference in appointment and the mere fact that his nominee had filed the earliest petition was of no consequence.

The preference sections of the present Probate Act⁵ had not been

¹¹ 98 N. J. Eq. 326, 129 A. 244 (1925).

¹² *In re Timmis*, 200 N. Y. 177, 93 N. E. 522 (1910).

¹³ 18 C. J. S., Corporations, § 515, p. 1194 at p. 1197.

¹ 314 Ill. App. 560, 41 N. E. (2d) 783 (1942).

² Ill. Rev. Stat. 1941, Ch. 3, §§ 248-9 and 253.

³ Several other heirs at law existed, but they were not members of the same class, or were nonresidents, so no question as to their rights was involved.

⁴ Ill. Rev. Stat. 1941, Ch. 3, § 251.

⁵ Ill. Rev. Stat. 1941, Ch. 3, §§ 248-9 and 253.

interpreted up to the time the instant case was decided. Under the Administration Act of 1872,⁶ which was substantially the same as the present law,⁷ much the same question was involved in the case of *Justice v. Wilkins*.⁸ It was there held that an appointee of a person qualified to administer could not be granted letters of administration when other members of the same class applied for appointment; consequently, the nominee, being a stranger to the class, could not be given preference unless all the members of the class waived their right to administer. The rule there laid down was followed in a number of later cases.⁹

The nominee, in the instant case, contended that this rule had, however, been superseded by the provisions of the new act since the apparent intention of the legislature was to place the nominee on a parity with the person nominating him and with others in the same class. It is true that the act does state that the court may "grant letters to one or more of them or to the nominee of one or more of them,"¹⁰ which would seem basis for the belief that nominee and person nominating were equal to one another. The court, however, felt that some discretion was permitted it and, therefore, it applied the rule of the Wilkins case.

The result reached in the instant case cannot here be criticised. The new act, as interpreted, allows the court to use discretion in granting letters to one or more members of the same class or to their nominee. The mere fact that the one claiming the right to administer files his petition first, before others in the same class have acted, should be immaterial. To hold otherwise would tend to promote a race from the death bed, a situation which was, undoubtedly, not the intent of the legislature. The decision would, without doubt, be upheld by the Illinois Supreme Court.

C. JELINEK

INFANTS—DISABILITIES IN GENERAL—WHETHER INFANT IS LIABLE FOR NEGLIGENCE OF AGENT UNDER DOCTRINE OF RESPONDEAT SUPERIOR—In the case of *Palmer v. Miller*,¹ the Illinois Supreme Court held that an infant could not be held liable in tort under the doctrine of respondeat superior. The facts of the case are as follows: The infant obtained his parent's car to take himself and some friends to a dance. While at the dance the infant was injured and the infant's companion requested the

⁶ Ill. Rev. Stat. 1937, Ch. 3, § 18.

⁷ Under the older act, brothers were placed in a class by themselves, as were sisters, the former being one class ahead of sisters in the order of preference. Under the new act, brothers and sisters are placed in the same class.

⁸ 251 Ill. 13, 95 N. E. 1025 (1911), reversing 158 Ill. App. 504 (1910).

⁹ See, for example, *Bundy v. Wilkins*, 183 Ill. App. 560 (1913); *Bachman v. Wilkins*, 194 Ill. App. 232 (1915).

¹⁰ Ill. Rev. Stat. 1941, Ch. 3, § 249. Italics added.

¹ 380 Ill. 256, 43 N. E. (2d) 973 (1942), reversing 310 Ill. App. 582, 35 N. E. (2d) 104 (1941).

plaintiff to ride with him and the infant back to town to a doctor. This the plaintiff consented to do. Upon the trip the minor's companion lost control of the car and the plaintiff was seriously injured. She sued the infant, seeking to impute to him the negligence of his companion. The court repudiated such theory and gave a decision in favor of the minor.

The general rule is that an infant is liable for his own negligence;² but just as general is the rule that an infant cannot be held liable under the doctrine of respondeat superior.³ An infant is unable to enter into any but a voidable contract at its inception. He can disaffirm or affirm the contract upon reaching his majority, but until that time the contract is voidable if the infant wishes to interpose the defense of infancy.⁴ The instant case involved an attempt to carry the relationship a bit further. The plaintiff, in attempting to impute the negligence of a companion to the minor, necessarily must do so through some form of agency relationship. The court rightly held that, as the infant was incapable in law of creating a binding agency relationship, it necessarily followed that the negligence of his companion could not be imputed to him.

The courts of other jurisdictions have reached the same conclusion based upon practically the same reasoning.⁵ There appear to be only two exceptions to the majority holdings. A Tennessee case⁶ holds that a minor may be held liable when the driver of the auto was under the direct control of and acting in the presence of the minor.⁷ There is also an early New York case⁸ which holds a minor liable for a nuisance arising from his realty even though he had a guardian representing him. The theory thereof may have been that the act complained of was one caused by the infant's own negligence and therefore within the general rule that a minor is liable for his own negligence. Otherwise

² Cooley, *Torts* (4th ed.) I, 194, § 66; *Thompson v. Bell*, 129 F. (2d) 211 (1942); *Fernandez v. Lewis*, 92 S. W. (2d) 305 (Tex. Civ. App., 1936); *Cunningham v. Ill. Central Railroad Co.*, 77 Ill. 178 (1875); *Hodge v. Feiner*, 338 Mo. 268, 90 S. W. (2d) 90, 103 A. L. R. 483 (1936).

³ *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N.S.) 1092 (1914); *Smith v. Kron*, 96 N. C. 392, 2 S. E. 533 (1887); *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94 (1902); *Burnham v. Seaverns*, 101 Mass. 360, 100 Am. Dec. 123 (1869); *Hampel v. Detroit G. R. & W. Ry. Co.*, 138 Mich. 1, 100 N. W. 1002 (1904); *Wilcox v. Wunderlich*, 73 Utah 1, 272 P. 207 (1928).

⁴ *Potter v. Florida Motor Lines*, 57 F. (2d) 313 (1932); *Swiney v. Womack*, 343 Ill. 278, 175 N. E. 419 (1931); *Welch v. King*, 279 Mass. 445, 181 N. E. 846 (1932); *Sternlieb v. Normandie Nat. Securities Corporation*, 263 N. Y. 245, 188 N. E. 726, 90 A. L. R. 1437 (1934); *Campbell v. Sears, Roebuck & Co.*, 307 Pa. 365, 161 A. 310 (1932); *Andrews v. Floyd*, 114 W. Va. 96, 170 S. E. 897 (1933).

⁵ See cases listed in notes 2 and 3, ante.

⁶ *Wilson v. Moudy*, 22 Tenn. App. 356, 123 S. W. (2d) 828 (1939).

⁷ In the instant case, the question whether the driver was acting under the control of the minor while in his presence was not discussed by the court.

⁸ *McCabe v. O'Connor*, 38 N. Y. S. 572 (1896), affirmed in 162 N. Y. 600, 57 N. E. 1116 (1900).

the view would seem to be contrary to the majority of holdings in other jurisdictions.

While this is the first time the Illinois Supreme Court has directly passed upon the question here involved, the result was anticipated, for the court is but carrying to a logical conclusion the results reached in prior decisions involving the liability of an infant in tort.⁹

P. M. HICKMAN

JUDGMENTS—ACTIONS ON JUDGMENTS—WHETHER INTEREST ON A JUDGMENT IS PART OF IT WITH REGARD TO THE STATUTE OF LIMITATION—Recently a writer, in commenting on a decision of the Illinois Supreme Court,¹ expressed the hope that the effect of such decision would be confined to cases of that restricted nature, i.e. those in which the principal amount of the judgment has been paid so that the claim for interest thereon could be treated as a separate demand. Apparently the hope expressed has received fortification by the decision of the Illinois Appellate Court in the case of *People ex rel. 1111 North La Salle Corporation v. City of Chicago*.² In that case, a mandamus proceeding was brought to compel the City of Chicago to pay a judgment rendered in 1930 in certain condemnation proceedings together with all accumulated interest thereon. The trial court, in granting the writ, ordered the principal of the judgment paid, but denied the prayer for interest on the ground the same was barred by the five-year statute of limitation.³ On appeal from the portion of the judgment which denied the claim for interest, the Appellate Court indicated there was a clear distinction between the instant case and the situation found in the *Blakeslee* and related cases, consequently it regarded itself free to pronounce a different decision. It held that the relator's claim for interest was to be regarded as an integral part of the judgment and could not be deemed barred before the principal claim itself was extinguished.

Problems of this nature have arisen by reason of the financial difficulties experienced by the municipalities of the state during the depression years. Judgments rendered against them, whether based on condemnation proceedings or other forms of claim, have been left unpaid until the judgment creditor has been compelled to resort to judicial action. In the fear that collection would be difficult or long drawn out, the judgment creditor has often, though with reluctance, accepted the principal sum due. No regard for its obligation to pay interest⁴ has been expressed by the municipal judgment debtor until, following such tardy

⁹ *Wilson v. Garrard*, 59 Ill. 51 (1871); *Cunningham v. Ill. Central Railroad Co.*, 77 Ill. 178 (1875); *Hartnett v. Boston Store of Chicago*, 265 Ill. 331, 106 N. E. 837 (1914); *Perelson v. Podolsky*, 191 Ill. App. 589 (1915); *McDonald v. City of Spring Valley*, 285 Ill. 52, 120 N. E. 476 (1918); *Hunter v. Egolf Motor Co.*, 268 Ill. App. 1 (1932).

¹ *Blakeslee's Storage Warehouses v. City of Chicago*, 369 Ill. 480, 17 N. E. (2d) 1 (1938), noted in 17 CHICAGO-KENT LAW REVIEW 189.

² 316 Ill. App. 66, 43 N. E. (2d) 691 (1942).

³ Ill. Rev. Stat. 1941, Ch. 83, § 16.

⁴ Ill. Rev. Stat. 1941, Ch. 74, § 3.

payment of the principal, a suit is instituted to collect the same. To defeat such action the municipality has then sought refuge in the defense of the statute of limitation, and has succeeded, at least in claims arising through condemnation proceedings, in convincing the Illinois Supreme Court that the short statute of limitation should apply.⁵ It is a matter of some doubt whether, by these decisions, the court was announcing a new rule of law, or merely creating a special exception to recognized principles when applied to claims for interest on condemnation awards. If the former, it is submitted the new rule is illogical and unsound; if the latter, the decision in the instant case serves notice that the exception so created will not be enlarged.

On the general subject, it may be noted that a judgment at common law did not draw interest,⁶ hence any present provision therefore is purely statutory in origin.⁷ If the legislature, in enacting such statute, intended to create an additional remedy for the judgment creditor, there is no doubt that, absent any special provision, the language of Section 16 of the Limitation Act⁸ would control. But all statutes enacted are presumed to be in aid of the common law unless the contrary appears,⁹ hence usually result in expanding the scope of the ancient rights and remedies rather than in the creation of new ones.¹⁰ Unless special limitations are placed on the expanded right, it would naturally follow that the former limitation should continue unchanged, since only one, though now larger, basis for recovery exists.

Those courts which have had occasion to deal with the problem up until recently, have been unanimous in the view that the claim for interest on a judgment is so integral a part of the judgment that execution will lie to collect the same without separate action being necessary,¹¹ and that the interest claim is not barred prior to the time when the major claim is outlawed.¹² Such a view at least possesses the merit of being a logical application of fundamental principles to preserve sym-

⁵ *Blakeslee's Storage Warehouses v. City of Chicago*, 369 Ill. 480, 17 N. E. (2d) 1 (1938); *Cohen v. City of Chicago*, 377 Ill. 221, 36 N. E. (2d) 220 (1941); *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 299 Ill. App. 614, 19 N. E. (2d) 625 (1939).

⁶ *Schwitters v. Springer*, 236 Ill. 271, 86 N. E. 102 (1908); *Totten v. Totten*, 294 Ill. 70, 128 N. E. 295 (1920).

⁷ *Feldman v. City of Chicago*, 363 Ill. 247, 2 N. E. (2d) 102 (1936).

⁸ Ill. Rev. Stat. 1941, Ch. 83, § 16 applies to "all civil actions not otherwise provided for." When the legislature created the new remedy for wrongful death, Ill. Rev. Stat. 1941, Ch. 70, § 1, they expressly provided that suits brought should be instituted "within one year after the death of such person." Ill. Rev. Stat. 1941, Ch. 70, § 2. It follows that, when providing for interest on a judgment, the legislature might have placed a special limitation thereon if they had seen fit so to do.

⁹ *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281 (1882); *Kosicki v. S. A. Healy Co.*, 380 Ill. 298, 44 N. E. (2d) 27 (1942).

¹⁰ *Payne v. New York, Susquehanna & Western R. Co.*, 201 N. Y. 436, 95 N. E. 19 (1911).

¹¹ See *Johnson v. Tuttle*, 17 Abb. Pr. (N. Y.) 315 (1863); *Foakes v. Beer*, 9 A. C. 605 (1884).

¹² *Dickson v. Epling*, 170 Ill. 329, 48 N. E. 1001 (1897). See also *Tracey, Receiver*

metry in the law. Departure from it, in the *Blakeslee* case, may well be lamented, but, if the decision in the instant case should stand, it will have served to minimize the exception thereby created. R. C. NELSON

MECHANICS' LIENS — RIGHT TO LIEN — WHETHER A STATUTE PROVIDING FOR LIEN FOR MATERIALS USED IN FORM WORK IS CONSTITUTIONAL—
In the case of *Douglas Lumber Company v. Chicago Home for Incurables*,¹ the plaintiff was a material-man supplying lumber for forms to be used in concrete construction on property being remodeled under a contract between a sublessee of the premises, with the consent of the owner, and the general contractor. The plaintiff, having a balance of his account unpaid, sued to foreclose a lien upon the real estate under the provisions of Section 21 of the Illinois Mechanics' Lien Act.² Objection to such relief was predicated on the ground that: (1) the statute relied on was unconstitutional, and (2) that the sub-contractor, through whom plaintiff claimed, was not licensed as required by city ordinance. The trial court nevertheless entered a decree as prayed for and, on appeal to the Supreme Court, because a constitutional question was involved, the same was affirmed.

Two questions in the case are deserving of note. The first concerns the constitutionality of Section 21 of the Illinois Mechanics' Lien Act. It was urged by appellant that the statute in question was objectionable because it was vague, indefinite, and discriminatory. The alleged uncertainty arose out of the types and kinds of material which were to furnish the basis for the lien; the alleged discrimination existed between material-men furnishing material for concrete forms or form work and those furnishing other kinds of material used in the construction of the improvement. A further discrimination was claimed to exist in that, in the case of one furnishing the form work, there was no requirement that a contract be shown to form the basis for the lien, while in the case of one furnishing other kinds of material it was essential that a contract between the owner and the contractor be established.

Prior to the revision of the Mechanics' Lien Act of 1895,³ it was well settled that unless the materials were "actually used" in the construction of the building no lien would attach.⁴ In the revision of that year, Section 7 provided that a lien should not be defeated for lack of proof that the material actually entered into construction, it being sufficient

v. Shanley, 311 Ill. App. 529 at 539, 36 N.E. (2d) 753 at 757 (1941) where the court stated: "Interest on a judgment does not accrue at any one certain date but its accrual is from day to day, and the accruing interest is not separated from the judgment and the statute of limitations does not run against it until the judgment itself is barred by the statute." The judgment itself is not barred until twenty years after its rendition. Ill. Rev. Stat. 1941, Ch. 83, § 24b.

¹ 380 Ill. 87, 43 N.E. (2d) 535 (1942).

² Ill. Rev. Stat. 1941, Ch. 82, § 21.

³ Laws 1895, p. 229, § 7.

⁴ *Compound Lumber Co. v. Murphy*, 169 Ill. 343, 48 N.E. 472 (1897); *Hunter v. Blanchard*, 18 Ill. 318 (1857).

that the same be delivered for the purpose of being so used. In 1912, however, the Illinois Supreme Court held that Section 7 did not extend to include materials not incorporated in the finished structure.⁵ In 1913 therefore, another amendment was made providing for a lien for every person who "shall furnish any material to be employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed form or form work where concrete, cement, or like material is used in whole or in part. . ."⁶ It is this amendment which was under attack in the instant case. The court pointed out that the words of the act were to be given a reasonable interpretation and held, upon the authority of *Von Platen & Dick v. Winterbotham*,⁷ that any claim for lien must find support in a valid contract, express or implied, for the making of the improvement. Once the original contract is established the sub-contractor furnishing material of any sort need only show that such material was expressly or impliedly necessary to the completion of the original contract. In so holding, the court did no more than extend the authority of that case to cover material-men furnishing forms or form work where concrete and like materials are used in any improvement. It should be noted that, prior to the decision in the Von Platen case, the court had held that the lien of a sub-contractor depended upon his own conduct and had no relation to the original contract.⁸ It would seem, therefore, that the rule in the Von Platen case, as extended, is now the settled law of the state.

The second argument to defeat the lien was predicated on the fact that plaintiff had furnished the material in question to a mason sub-contractor who had failed to procure a license as required by the ordinances of the City of Chicago,⁹ hence, since the contract between the general contractor and the mason was void as against public policy, no lien could be based thereon. The court held, however, that the ordinance was not such as to make the contract invalid, but was merely a licensing device. It distinguished between ordinances and

⁵ *Rittenhouse & Embree Co. v. F. E. Brown & Co.*, 254 Ill. 549, 98 N.E. 971 (1912).

⁶ Ill. Rev. Stat. 1941, Ch. 82, § 21.

⁷ 203 Ill. 198, 67 N.E. 843 (1903). See also *Kelly v. Johnson*, 251 Ill. 135, 95 N.E. 1068 (1911); *Williams v. Rittenhouse & Embree Co.*, 198 Ill. 602, 64 N.E. 995 (1902).

⁸ *Keeley Brewing Co. v. Neubauer Decorating Co.*, 194 Ill. 580, 62 N.E. 923 (1902).

⁹ Municipal Code of the City of Chicago, 1939, Ch. 151, § 2, provides that: "Any person engaged in, or desiring to engage in, the business of masonry or mason work, either as contractor, sub-contractor, or employing mason, in the city, shall submit to an examination and shall obtain a license as a mason contractor or employing mason. . . ." Ch. 151, § 7, further states: "In case any mason work on any such building or structure shall be performed by any contractor or employing mason not licensed as herein provided, such permit shall be revoked, and the masonry work on such building or structure shall be stopped by order of the head of the department charged with the enforcement of the provisions of this code pertaining thereto, and the person performing such work and the person having such work done shall be subject to the penalty hereinafter prescribed."

statutes prohibiting the unlicensed doing of an act and those merely providing a penalty for such conduct. It pointed out that the question was one between the city and the mason, and had no effect upon the contract, and the failure of the mason sub-contractor to obtain the license did not invalidate the plaintiff's claim for materials furnished. The decision of the court on this question is made without the citation of precedent. It would seem that the plaintiff was charged with no actual notice of the absence of the license, nor does it appear that any constructive notice of this fact could be urged. If no duty rested upon him to investigate the validity of the contract, it would seem that the plaintiff's claim should not be defeated, he having furnished material in good faith and without notice of any claimed illegality in the mason sub-contractor's contract.

The court did not decide what seems to be a material question on these facts: that is, assuming a failure on the part of the mason sub-contractor to obtain a license, should this affect his right to maintain a lien claim? The court has intimated that the failure of the mason sub-contractor to obtain a license would not bar any claim he might assert. It is believed the court did not intend this result, for the court has held in prior cases that statutes regulating a trade, profession or business are public policy statutes and that contracts made in violation of their provisions are illegal and unenforceable.¹⁰ It is true on the other hand that licensing statutes for revenue only do not have such effect.¹¹ It has also been decided that municipalities are without power to enact ordinances purely for revenue but that all licensing ordinances must find validity in the power of the city to regulate the business licensed.¹² On this reasoning, therefore, it should follow that any valid licensing ordinance of a city must be held to be regulatory legislation. As such, a question of public policy becomes involved and a contract made in violation of the ordinance should be regarded just as illegal between the parties as it would if made in violation of a statute. Though an innocent material-man should not be denied a lien, it would seem unjust to grant such a beneficial remedy to a contractor or sub-contractor whose own fault is involved.

R. C. VOGEL

MORTGAGES—REDEMPTION—OPERATION AND EFFECT OF DEFICIENCY JUDGMENT—In *Johnson v. Zahn*¹ the Illinois Supreme Court had occasion to determine for the first time whether or not the purchaser of the mortgagor's statutory right of redemption, after foreclosure, sale and de-

¹⁰ *Cooper v. Schoeberlein*, 247 Ill. App. 147 (1928); *Western Cold Storage Co. v. Estate of Kaufman*, 204 Ill. App. 477 (1917); *Dunlop v. Mercer*, 156 F. 545 (1907); 13 C.J. 423; 12 Am. Jur. 658; *Love, Mechanic's Liens*, § 164. That the prohibition may be implied, see *Bartlet and Viner*, 4 Will. & Mar. R. B., Skin. 322, 90 Eng. Rep. 144 (1692).

¹¹ *Anson, Contracts*, § 279; 13 C. J. 423; 12 Am. Jur. 658.

¹² *Aberdeen-Franklin Coal Co. v. City of Chicago*, 315 Ill. 99, 145 N.E. 613 (1924); *Barnard & Miller v. City of Chicago*, 316 Ill. 519, 147 N.E. 384 (1925).

¹ 380 Ill. 320, 44 N.E. (2d) 15 (1942).

iciency decree, who redeems within the statutory period takes the land free of any incumbrance by reason of the deficiency decree. The occasion arose from the following set of facts: Plaintiff was the holder of a promissory note secured by a trust deed on the premises involved in the suit. A decree of foreclosure and sale was entered, the premises were sold to plaintiff and a certificate of purchase was delivered to her on October 6, 1936. A few days later a deficiency judgment was entered against the mortgagor in favor of the plaintiff for the balance of the note over and above the amount realized on the sale. On April 5, 1937, within the period of redemption, the mortgagor, by quit-claim deed, conveyed his interest to defendant who redeemed. The certificate of redemption was recorded. Later the sheriff levied execution of plaintiff's judgment on the real estate and sold it to the plaintiff, delivering to her a deed therefor. Plaintiff then brought this ejectment action. On appeal, judgment for the defendant was affirmed.

The plaintiff argued that a deficiency decree is to be considered as a judgment at law² and is, therefore, a lien on all property of the debtor, and that, since the statutory right of redemption is an interest in real estate, the judgment is a lien on that interest and goes with it into the hands of the mortgagor's grantee after sale. She contended that the redemption provisions of the statute do not prevent the lien of the deficiency decree from attaching but only suspend its operation during the period of redemption. It was further argued that since the lien of the deficiency decree would have attached to the land had the mortgagor redeemed, it must attach to the land when the mortgagor's grantee, after sale, redeems.

The court, however, decided that, since no lien under the deficiency decree existed as to this piece of property during the period of redemption, the grantee took at a time when there was no lien and his rights were not subject to the lien of a judgment which ran only against the mortgagor personally. The court pointed out that the rule that no lien exists during the period of redemption was a rule of property in this state of long standing and hence ought to be adhered to.³ The result of the holding is that the purchaser of a mortgagor's statutory right of redemption after foreclosure sale and deficiency decree takes, upon redemption, the property free from any incumbrance by reason of the deficiency decree.

The result is not unexpected and is desirable in view of the fact

² Ill. Rev. Stat. 1941, Ch. 22, § 44.

³ See *Gaskin v. Smith*, 375 Ill. 59, 30 N.E. (2d) 624 (1940), which was a case where there was a transfer of the equity of redemption to another before foreclosure sale and deficiency decree, and the action was one to set aside the transfer on ground of fraud. The case relied on *Ogle v. Koerner*, 140 Ill. 170, 29 N.E. 563 (1892), where the controversy was between the assignee of a junior mortgagee and the senior mortgagee, and there was no deficiency decree. That case in turn relied on *Seligman v. Laubheimer*, 58 Ill. 124 (1871), where again the controversy was not between senior mortgagee and grantee of mortgagor, but between senior and junior mortgagees.

that property rights have been established with this result anticipated by most of the bar in this state, but it would be more satisfying if the present decision had been more logical. The court did not fairly meet the plaintiff's contention that the statutory right of redemption is an interest in land and, therefore, subject to the lien of the deficiency decree, and the cases it relied on are not entirely persuasive.⁴ If the right of redemption is an interest in land it would seem that the court reached an erroneous result since the Mortgages Act⁵ makes deficiency decrees the same as other decrees for the payment of money. By the Chancery Act⁶ these decrees are made liens on all lands just the same as are judgments at law, which, by the Judgment statute,⁷ are to be regarded as liens on any real estate of the judgment debtor, including lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereto. If the right of redemption is an interest in land, the statute would seem to require a holding that the deficiency decree is a lien against it. Therefore the court must have assumed that the right of redemption was some species of personal property and hence not subject to the lien until actual possession was taken. Had the mortgagor himself redeemed, the lien of the deficiency decree would attach to the land, not because it was a lien on the right of redemption, but because the mortgagor would then own the property and it would be subject to the lien as would any of his real estate.

That the right of redemption is not an estate in land is plainly stated in an earlier appellate court case in these words: "This 'right of redemption' is not real estate . . . is not an estate, but a mere privilege. . . ."⁸ Such language accords with the older view that a mortgage was a conveyance upon a condition subsequent, the title to the land being vested in the mortgagee until payment of the debt. Upon failure to pay according to the terms of the grant, such title became absolute in the mortgagee. With the recognition of the idea that the present-day mortgage more nearly constitutes but a lien, title remaining in the mortgagor until destroyed by a completed foreclosure, such expressions tend to lose value. Moreover it is a little ridiculous to say that this statutory right is personal property in view of the fact that such interest is usually transferred by quit-claim deed or other form of conveyance signifying a real estate transfer. The result reached, however, is consistent with authority found in some of the compilations of the law and in at least one other jurisdiction.⁹ Yet there are cases in other states, and some statements in the treatises, to the effect that the statutory right to redeem after foreclosure is an interest in real estate and hence should be subject to the lien of a judgment.¹⁰

⁴ See note 3, *supra*.

⁵ Ill. Rev. Stat. 1941, Ch. 95, § 17.

⁶ Ill. Rev. Stat. 1941, Ch. 22, § 44.

⁷ Ill. Rev. Stat. 1941, Ch. 77, §§ 1, 3, and 10.

⁸ *People v. Barrett*, 165 Ill. App. 94 at 98 (1911).

⁹ 31 Am. Jur., Judgments, § 328; *Morsell v. First Nat. Bank*, 91 U.S. 356, 23 L.Ed. 436 (1876). See also 30 A.L.R. 524.

¹⁰ *Atwater v. Manchester Savings Bank*, 45 Minn. 341, 48 N.W. 187, 12 L.R.A.

There are, perhaps, at least two other considerations leading to an approval of the result reached in the instant case, although it may not seem entirely logical. One is that it seems to promote the legislative intent to give the mortgagor a year in which to be able to redeem. Burdening his right with a judgment lien would tend to defeat this end. Then too, the equitable doctrine of marshalling of assets, which apparently had an effect on the judgment and redemption provisions of the statute,¹¹ aims to make the land pay as many of the debtor's creditors as possible.¹² This end is also promoted by the result, since it gives other creditors of the mortgagor some opportunity to get at least part of their debts out of the land. It should, however, be borne in mind that the court in the instant case pointed out that the mortgagor's grantee would not take free from the lien of the deficiency decree where it could be shown that he redeemed for the benefit of the mortgagor.

G. ADLER

WORKMEN'S COMPENSATION—NOTICE OF ACCIDENT OR INJURY—WHETHER DEATH MUST OCCUR WITHIN ONE YEAR FROM DATE OF ACCIDENT—The Illinois Supreme Court in the recent case of *Hilberg v. Industrial Commission*¹ had occasion, for the first time since its passage, to construe the 1939 amendment to the section of the Workmen's Compensation Act dealing with the time within which claims for compensation could be filed with the Industrial Commission.² The husband of the plaintiff therein was injured in the course of his employment on April 27, 1937. Notice of accident and claim for compensation were duly made, an award entered, and a lump sum settlement paid February 2, 1938. Hilberg died on October 26, 1939, as a result, or so it was claimed, of his accidental injury. On November 4, 1939, his widow filed application for compensation for death. An arbitrator dismissed the application and the Industrial Commission affirmed the dismissal. A writ of error to the Circuit Court of Cook County, which had confirmed the order of the Commission upholding the arbitrator's finding, brought the case to the Supreme Court.

Before the amendment in question, the act had provided that application for compensation had to be filed with the Industrial Commission within one year from the date of the "injury" or within one year from

741 (1891); *Sullivan v. Leckie*, 60 Iowa 326, 14 N.W. 355 (1882); 31 Am. Jur., Judgments, § 328; 36 Am. Jur., Mortgages, § 180.

¹¹ Ill. Rev. Stat. 1941, Ch. 77, §§ 18, 20, and 23.

¹² *Ogle v. Koerner*, 140 Ill. 170, 29 N.E. 563 (1892).

¹ 380 Ill. 102, 43 N.E. (2d) 671 (1942).

² Ill. Rev. Stat. 1941, Ch. 48, § 161, which reads: "... Provided, that in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the accident, where no compensation has been paid, or within one year after the date of the last payment of compensation, where any has been paid, the right to file such application shall be barred; Provided, further, that if the accidental injury results in death within said year, application for compensation for death may be filed with the Industrial Commission within one year after the date of death, but not thereafter."

the date of the last payment of compensation.³ The section did not expressly mention compensation for death. The Illinois Supreme Court, in *Burke v. Industrial Commission*,⁴ held that in case of death caused by an accidental injury the section meant that application for death compensation could be filed within one year from the date of death even though that was not within one year from the date of the accident nor within one year from the date of the last payment of compensation. The court then felt that the death of the injured employee entitling his dependents to compensation was the injury to them and that that was the injury referred to in the act. Under that decision an application for death compensation might be filed several years after the accident and after the last payment of injury compensation. Shortly after the decision was handed down the legislature adopted the amendment referred to above. It followed rather closely the previous language as to application for compensation and then added a provision that in case of death within "said year" application for death compensation must be filed within one year from the date of death.

In the instant case the court affirmed the circuit court, holding that the phrase "within said year" obviously referred to the year in which the employee could file an application for compensation for the injury. The court found that the legislative intent was to make specific the time beyond which an employer would not be liable for compensation for death resulting from an accident, and that, to accomplish that intent, the act must mean that death must occur within one year from the date of the accident or from the date of the last payment of compensation and that application must be made within one year from the date of death. In view of the change in the language of the act from "injury" to "accident" after the *Burke* case, and the addition of the clause expressly referring to application for compensation for death, it would seem that the court came to a correct conclusion as to the meaning of the amendment.

G. ADLER

³ Ill. Rev. Stat. 1937, Ch. 48, § 161 read: ". . . Provided, that in any case, unless application for compensation is filed with the industrial commission within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

⁴ 368 Ill. 554, 15 N.E. (2d) 305, 119 A.L.R. 1152 (1938).